UPREME COURT U. S.

JUN 9 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1414

J. W. ANDERSON, et al - - - - - - - Appellants

versus

THE URBAN RENEWAL AND
COMMUNITY DEVELOPMENT AGENCY
OF THE CITY OF PADUCAH, KENTUCKY Appellee

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY

Motion to Dismiss Appeal, or in the Alternative, to affirm the Judgment of the Court of Appeals of Kentucky

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VS.

THE URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF PADUCAH, KENTUCKY APPELLEE

On Appeal From the Court of Appeals
of the State of Kentucky

MOTION TO DISMISS THE APPEAL HEREIN, OR IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT OF THE COURT OF APPEALS OF KENTUCKY.

The Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the Judgment of the Court of Appeals of Kentucky upon the following grounds:

1. This appeal does not present a substantial federal question.

2. The questions sought to be reveiwed herein were not timely or properly raised and were not expressly passed on below.

3. The appeal is not within the jurisdiction of this Court because it has not been taken in conformity with the Rules of the Supreme Court of the United States.

NATURE OF THE CASE

This case involves an eminent domain proceeding instituted in the Circuit Court of McCracken County, Kentucky (a Court of original jurisdiction in Kentucky) in which the landowner has challenged the right of the condemnor to take the property involved. By agreement of the parties, the issue concerning the right to condemn was limited to the question of whether or not the taking was for a public purpose. (This agreement is reflected in the Findings of Fact of the McCracken Circuit Court set forth in Appendix A of Appellants' Jurisdictional Statement on Page 25).

The McCracken Circuit Court afforded the landowner a trial upon the issue of the right to take and entered a Judgment that the condemnor had a right to take the property it sought to condemn.

The landowner appealed to the Court of Appeals of Kentucky from this Judgement and the Court of Appeals of Kentucky dismissed the appeal upon the grounds that Kentucky Revised Statute 99.420 (13), denies an appeal from a Judgment of a Circuit Court adjudicating the right to condemn property in actions instituted under Chapter 99 of the Kentucky Revised Statutes. (The opinion of the Kentucky Court of Appeals is set forth in full in Appendix A to Appellants' Jurisdictional Statement, Pages 21-23.)

ARGUMENT

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Judgment of the Kentucky Court of Appeals which is appealed from holds only the Kentucky Revised Statute 99.420 (13) denies the right to an appeal to the Court of Appeals of Kentucky from a ruling of a Kentucky Circuit Court adjudicating the right to condemn property in any proceeding instituted under Chapter 99 of the Kentucky Revised Statute.

In his Jurisdictional Statement (Page 5) Appellant raises the question of whether the denial of an appeal violates his constitutional rights.

In many cases, this Court has held that appellate review is not a matter of right but of grace and that the right of appeal is not essential to due process. *Kane vs. Durston*, 153 U.S. 684, 38 L. Ed. 867; *Ohio Ex Rel. Bryant vs. Akron Metropolitan Park District*, 281 U.S. 74, 74 L. Ed. 710; *Luckenbach Steamship Company, Inc. vs. United States*, 272 U.S. 533 71 L. Ed. 394.

The contention of appellant (set forth in questions 4, 5, 6 of his Jurisdictional Statement) that the Court of Appeals of Kentucky has misconstrued the language of the Statute and that the Statute does not in fact deny an appeal involves a matter of procedure in the Kentucky Courts and does not involve a federal question at all. In the light of the unbroken series of cases of this Court holding that the right of appeal is not essential to due process, the appellants' contention that the denial of his

right to appeal from the McCracken Circuit Court to the Court of Appeals of Kentucky deprived him of due process of law does not present any substantial federal question.

II

THE QUESTIONS SOUGHT TO BE REVIEWED BY APPELLANT WERE NOT PROPERLY OR TIMELY RAISED NOR EXPRESSLY PASSED ON BY THE COURTS BELOW

The appellant lists seven questions in addition to the four discussed hereinabove which he claims are presented for review on this appeal. (Appellants' Jurisdictional Statement pages 4-6).

The Jurisdictional Statement did not comply with rule 15 paragraph 1d of the rules of this Court by specifying at what stage of the proceedings and the manner in which these questions were raised in the courts below or the manner in which they were expressly passed upon.

The appellee believes that none of the questions claimed by appellant to be reviewable upon this appeal were timely or properly raised or expressly passed upon in the courts below except the question of whether the denial of an appeal denies due process.

The only question presented to the Circuit Court was whether the taking was for a public purpose. There was an express holding of the Circuit Court that the taking was for a public purpose.

On appellants' appeal from that Judgment of the Court of Appeals of Kentucky, Appellants attempted to expand the issues as follows:

> "The first question in issue is whether the appellee may condemn private property for redevelopment where the taking of express property was not for public use, but merely as an aid and assistance in obtaining a federal grant."
>
> "The second question in issue is whether an aid in obtaining a federal grant is tantamount to a necessity for the taking of excess property which was not considered in the original master plan of the appellee herein."
>
> (See Statement of questions presented—Appellants' Brief to the Court of Appeals of Kentucky).

These questions were not properly raised in the Circuit Court nor properly reviewable by the Court of Appeals of Kentucky.

Now in this Court, the appellant has expanded the questions presented to a total of eleven. These precise questions have not been properly presented not expressly passed upon in the courts below.

The precise questions which appellant seeks to have reviewed are as follows:

> Question 1: "Whether the legislature can authorize the taking of property in excess of that required for the public use, such excess to be later sold or devoted to private use."

No pleading in this case touches upon the right of a legislature to authorize the taking of property in excess of that required for the public use. No part of any Judgment herein purports to uphold any such legislative action.

Question 2: "Whether the condemnation of more property than needed for public use is a denial of due process."

This question was not raised in the lower court and the judgment in this case does not uphold the condemnation of more property than needed for a public use.

The public purpose in this case is the elimination of a blighted area and the appellants' property was found to be a part of the blighted area.

Question 3: "Whether the extent of that power is limited by the necessities of the particular public purpose or use for which the land is sought to be condemned."

Appellee does not believe that this question has ever been put directly in issue nor expressly passed upon by any Court in this case.

Questions 4, 5, 6, and 7 have been discussed hereinabove as not being substantial federal questions.

Question 8: "The Court's decision has not made a determination of the issue on appeal as to whether or not the Agency has the right to take property in excess of

public needs, without establishing a necessity for its taking."

Question 9: "The Court's decision has not made a determination of the issue on appeal as to whether or not an aid in obtaining a Federal grant is tantamount to a necessity for the taking of excess property."

Question 10: "The Court's decision has not made a determination of the issue on appeal as to whether or not the condemnation of more property than needed for public use is a denial of due process under the constitution of the United States."

These are not questions at all but merely statements and each statement shows on its face that it involves a matter not expressly passed on in the courts below. As shown by the discussion relative to questions 1 and 2 herein, these points were not properly raised in the courts below.

Question 11: "The Court has reached a policy decision in this case, when and if the mandate issues, will become an unfortunate addition to the jurisprudence of this State and Nation."

To the appellee, this does not appear to be a question and certainly not one which has been either properly raised or expressly passed upon in this litigation.

III

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE APPELLANT HAS NOT COMPLIED WITH PARAGRAPH 1 OF RULE 12 AND PARAGRAPH 1d OF RULE 15 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 12, paragraph 1, of the Rules of this Court requires that a party intending to appeal shall transmit the entire record in the Court from which the appeal is taken unless the parties agree that specified parts of the record may be omitted as unnecessary for the determination of the appeal.

The Appellant herein did not request the entire record to be transmitted and he has omitted from the record the transcript of evidence of the trial in the McCracken Circuit Court and various Orders of that Court setting forth the agreements of the parties limiting the issues. These portions of the record are material and necessary to the determination of the appeal and there was no agreement of parties that these portions of the record should be omitted.

The transcript of evidence would establish that the appellant was accorded full and fair judicial hearing on the question of the right of the condemnor to take the property of the appellant.

Rule 15, paragraph 1d requires the appellant in the Jurisdictional Statement to provide a statement of the case which specifies the state in the proceedings in the Court of first instance, and in the Appellate Court at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them; and the

way in which they were passed upon by the Court; with such pertinent quotations or specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears as will support the assertions that the rulings of the Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court.

In the Jurisdictional Statement submitted by appellant, there is listed eleven questions claimed to be presented for review by this appeal.

The appellant has not complied with paragraph 1d of Rule 15 by specifying the stages in the proceedings or the manner in which any of the questions were raised in the Court of first instance or the Appellate Court and has not shown the manner in which these questions were raised nor the way in which these questions were passed upon.

CONCLUSION

For all of the foregoing reasons, the appellee respectfully submits that this appeal should be dismissed, or in the alternative, the Judgment of the Court of Appeals of Kentucky should be affirmed.

Respectfully submitted,

ROY N. VANCE, JR.
310 Citizens Bank Building
Paducah, Kentucky

ATTORNEY FOR
APPELLEE

CERTIFICATION OF SERVICE

It is hereby certified that the foregoing Motion to Dismiss the Appeal or in the Alternative to Affirm the Judgment of the Court of Appeals of Kentucky has been served upon the opposing counsel by mailing a true copy thereof, postage prepaid, to Michael Avedisian, Esquire, and Andrew H. Avedisian, Esquire, Attorneys at Law, 1200 Broadway, Paducah, Kentucky, and to the Honorable C. Warren Eaton, trial judge, Courthouse, Paducah, Kentucky, and to each of the judges of the Court of Appeals of Kentucky, Frankfort, Kentucky.

THIS the day of May, 1969.

ROY N. VANCE, JR.

ATTORNEY FOR
APPELLEE